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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ZYZY, INC., and ZYZY, INC., d/b/a GUIDE PUBLISHING CO.; and REX S. MCBEATH,

Petitioners,

vs.

CITY OF EAGLE PASS, TEXAS; RAUL TREVINO, Individually; JOSE MORA, Individually; JOSE FRANCISCO FARIAS, Individually; RAUL TREVINO, JOSE MORA and JOSE FRANCISCO FARIAS, In Their Official Capacities,

Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

HENRY J. ACKELS
ACKELS AND ACKELS, L.L.P.
200 Embassy Court
624 North Good-Lattimer Expressway
Dallas, Texas 75204
(214) 826-1111

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Should *Certiorari* be granted to resolve the conflict among the federal circuit courts of appeals regarding the appropriate standard of review to be applied to errors in jury instructions?

2. Is it appropriate for the Fifth Circuit Court of Appeals to apply the stringent "substantial and ineradicable doubt" test to determine whether the jury instructions as a whole, properly guided the jury as to the required burden of proof in First Amendment violation cases?

3. If the "substantial and ineradicable doubt" test is the appropriate test to be applied, is harmless error analysis part of this inquiry or is it an additional hurdle that the aggrieved party must satisfy?

4. Did the Fifth Circuit Court of Appeals err in finding that there was not a substantial and ineradicable doubt that the conflicting jury instructions misled the jurors as to the respective parties' burden of proof?

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Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

ZYZY, INC., and REX MCBEATH, respectfully petition this Court to issue a Writ of Certiorari to review an order of the United States Court of Appeals for the Fifth Circuit, dated June 27, 1997 on appeal from a judgment of the United States District Court, Western District of Texas (Fred Biery, Judge) filed February 14, 1996.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Fifth Circuit is attached hereto in the appendix as "A". The order is not officially reported.

The jury instructions and the special interrogatories of the United States District Court, Western District of Texas are attached hereto in the appendix as "B".

JURISDICTIONAL STATEMENT

This petition seeks review of an order entered by the United States Court of Appeals for the Fifth Circuit which was filed on June 27, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

This petition is timely filed within ninety days of the date of the issuance and entry of the order below.

PARTIES

The Petitioners in both the United States Court of Appeals for the Fifth Circuit and in the United States District Court were ZYZY, Inc., and Rex McBeath, individually (hereinafter collectively referred to as ZYZY, Inc.) The Respondents in those courts were City Of Eagle Pass and three city council members.

CONSTITUTIONAL PROVISIONS

1. The First Amendment of the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press ..." This provision is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. There is significant State contact between the Respondents and the State of Texas. The Respondents are: The City of Eagle Pass, a municipal/governmental entity within the State of Texas and three individual city council members, who comprised the majority of the city council and thus controlled the city government.

STATEMENT OF THE CASE

This case involves a constitutional issue of the highest magnitude; governmental retaliation against the press for publishing critical reviews, articles and editorials. The essential facts are undisputed. Both parties agree that the ZYZY, INC., was the owner and publisher of the CITY OF EAGLE

PASS'S (hereinafter "the City") official newspaper "THE GUIDE" for over 100 years. During the 1960's, a city ordinance proclaimed this newspaper to be the city's official newspaper as such, "THE GUIDE" published all city advertising and legal notices and received thousand of dollars of revenue therefrom.

Both parties further agree that the City terminated "THE GUIDE" as the city's official newspaper on October 4, 1994, and replaced it with another local newspaper. The reason for termination is disputed.

ZYZY, INC., brought suit because its First Amendment rights to free speech and freedom of the press were violated. ZYZY, Inc., alleged that the City of Eagle Pass sought to punish it by withdrawing its newspaper as the City's official newspaper because it published a series of critical news articles and editorials about the City and its council members, and that this termination violated the First Amendment of the United States Constitution, and occurred in blatant disregard for its constitutional rights to free speech and freedom of the press.

The Defendants argued that they did not violate the First Amendment because they have a non-retaliatory motive for terminating the Plaintiffs.

Both parties agree that the test propounded by this court in *Mt. Healthy v. Doyle,* 429 U.S. 274 (1977), and as re-affirmed in *Bd. of County Commissioners, Wabaunsee County, Kan. v. Umbehr,* __U.S.__, 117 S. Ct. 2342 (1996), is the proper test to determine the burden of proof in First Amendment cases. In that case, this Court established a two prong test to determine whether there has been a violation. *Mt. Healthy,* provides that once it is established that the plaintiff's speech is protected under the First Amendment, then the plaintiff need only prove that the protected conduct was a substantial or motivating factor in the defendants' actions. Upon such showing, the burden *shifts* to the defendants to prove that they would have acted in the same way, even in the absence of

such conduct. It is axiomatic that in First Amendment cases the law allows plaintiffs a more favorable burden of proof.

In this case, the trial court correctly informed the jury that the First Amendment covered the speech under review, however, it prejudiced the Plaintiffs by submitting improper special interrogatories to the jury. Rather than submitting the two-prong burden-shifting interrogatories required by *Mt. Healthy,* the trial court, over the Plaintiffs' objections, submitted the following interrogatories to the jury:

> Question No. 1
>
> Do you find from a preponderance of evidence that the following defendants intentionally withheld City of Eagle Pass advertising and public notices from the Guide in retaliation for the critical news articles and editorials printed by the Plaintiffs ... and would have selected The Guide instead of the News Gram as the City of Eagle Pass's official newspaper but for the Plaintiffs' exercise of their First Amendment right to free speech and free press ?
>
> Question No. 1A.
>
> Do you find from a preponderance of evidence that the following Defendants intentionally persuaded other Eagle Pass agencies to withhold advertising and public notices from The Guide in retaliation for the critical news articles and editorials printed by the Plaintiffs in The Guide and that the other Eagle Pass public agencies would have advertised and placed public notices in The Guide but for the persuasion of the Defendants?
>
> Question No. 2
>
> Do you find from a preponderance of evidence that the following Defendants intentionally obstructed or delayed the flow of city information to the Plaintiffs' news reporters in retaliation for the critical

news articles and editorials printed by the Plaintiffs in The Guide?

These interrogatories required the Petitioners to establish that the critical articles and editorials it published, were the *sole* cause of its termination. Furthermore, over Plaintiffs' objection, the trial court failed to submit interrogatories to the jury on the Defendants' burden of proof (the second prong of the *Mt. Healthy* test). The error in the trial court's charge placed a higher burden on the Plaintiffs than that required by law. Therefore, the Petitioners were deprived of their right to have the evidence reviewed under the proper legal standard.

In its unpublished opinion, the Fifth Circuit Court of Appeals acknowledged that the special interrogatories did not accurately state the parties' respective burdens of proof, but found that the jury instructions as a whole correctly conveyed the law. Relying on *Federal Deposit Ins. Co., v. Mijalis,* 15 F.3d 1314 (5th Cir. 1994), the court held that "We cannot say that the challenged jury instructions as a whole created substantial and ineradicable doubt whether the jury had been properly guided in its deliberations." Therefore, based on the "substantial and ineradicable doubt test", the court of appeals affirmed the trial court's erroneous jury charge.

REASONS FOR GRANTING THE WRIT

1. THE SUPREME COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUIT COURTS OF APPEALS AND TO DETERMINE THE APPROPRIATE STANDARD OF REVIEW TO BE APPLIED TO ERRORS IN JURY INSTRUCTIONS.

There is a split among the federal circuit courts of appeals relating to the proper standard to be applied in reviewing jury charge errors that shift or increase the burden of proof on the plaintiff. ZYZY, INC., respectfully contends that the "substantial and ineradicable doubt" test applied by the court of appeals is far too stringent. This minority test is applied by the courts of appeals in the fifth, seventh, and eleventh circuits only. The "likely to mislead" test applied by the majority

of the circuits is more appropriate to determine whether a judgment requires reversal due to erroneous jury instructions. This test looks to the issue of whether the erroneous portion of the jury instruction has the effect of misleading the jury as to the applicable law.

A. THE SUPREME COURT SHOULD RESOLVE THE CONFLICT BY ADOPTING "THE LIKELY TO MISLEAD" STANDARD OF REVIEW FOLLOWED BY THE MAJORITY OF THE CIRCUITS.

Four of the circuits, in one form or another, look to the issue of whether the erroneous portion of the jury charge has the effect of misleading the jury as to the applicable law. In contrast, the fifth circuit, specifically relied on the test announced in *Mijalis,* 15 F.3d 1314 at 1317, and held that it will only reverse and remand a case "if the charge as a whole leaves it with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." (The application of this test requires a determination that there is substantial and ineradicable doubt among the jurors as to the correct law to be applied). It is respectfully submitted that the more flexible test adopted by the majority of the circuits is the appropriate test to determine whether a judgment should be reversed due to errors in a jury charge.

The most recent case to discuss this "likely to mislead" standard is *Luciano v. Olsten Corp.,* 110 F.3d 210 (2nd Cir. 1997). In that case, the second circuit concluded that a jury charge is erroneous if the instruction misleads the jury as to the proper legal standard, or it does not adequately inform the jury of the law. The court held that it "would not grant a new trial, unless, taken as a whole, the jury instructions gave a misleading impression or inadequate understanding of the law." *Id.* at 218. Similarly, the sixth circuit, in *Clarksville-Montgomery County Sch. Sys.,* 925 F.2d 993, 1002 (6th Cir. 1991), held that in reviewing erroneous jury instructions it must satisfy itself that "the instructions show *no tendency to confuse or mislead* the jury with respect to the applicable principles of law." (emphasis added).

An even less stringent standard of review is applied by the third circuit when reviewing jury instructions. In *Ayoub v. Spencer,* 550 F.2d 164 (3rd Cir. 1977), the court reversed the judgment due to a jury charge error. The court found that in reading the charge as a whole, and considering its general effect, the jury *may* have been misled into believing that the plaintiff's failure to seek medical assistance contributed to his injury, and that he was barred from recovery without regard for the reasonableness of his conduct. *Id.* at 167.

A slightly different test is applied by the fourth circuit. In *Spell v. McDaniel,* 824 F.2d 1380, 1395 (4th Cir. 1987), the fourth circuit held that " the test of adequacy of instructions ... is simply a practical one of whether the instructions construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party." Prior to adopting the "substantial and ineradicable doubt" test, the fifth circuit applied a test similar to the test applied by the fourth circuit.

In *Petes v. Hayes,* 664 F.2d 523 (5th Cir. 1981), the court held that the interrogatories were so inconsistent with the jury instructions that they were likely to confuse or mislead the jury on the burden of proof. In that case, the plaintiff brought suit, claiming that the defendant supplied him with a defective respirator that caused a debilitating lung condition. The special interrogatory given to the jury implied that the plaintiff could not recover if there were other causes that contributed to his injury. However, the jury charge instructed that under Louisiana law, two or more causes of plaintiff's injury would not preclude recovery. The court held that because the special interrogatory "was so likely to mislead confuse the jury that it cannot be said that the contested issues were adequately presented to the jury." *Id.* at 526.

Adding to the split of authority is the fact that some circuits apply different tests in the civil and criminal context. In criminal proceedings, the courts have applied a more deferential standard of review to determine if jury instructions are

erroneous. Furthermore, in criminal proceedings there is uniformity among the circuits as to the standard of review for errors in jury instructions. In *United States v. Pace,* 10 F.3d 1106,1120 (5th Cir. 1993), the court succinctly set out the standard for review of errors in jury charges and held that "the presence of an imprecise or misleading statement within the jury instruction does not by itself entitle defendant to a reversal. Reversible error only exists if the jury charge, as a whole, misled the jury as to the elements of the offense." In *United States v. Branch,* 46 F.3d 440, 441 (5th Cir. 1995), the court also applied this test and found that the function of the reviewing court is to satisfy itself that the jury instructions show *no tendency to confuse* or mislead the jury with respect to the applicable principles of law.

Other circuits which follow the "substantial and ineradicable doubt" test in civil proceedings also follow a more deferential standard of review in criminal proceedings. In *Stoneking v. United States,* 232 F.2d 385 (8th Cir. 1956), the court held that the charge must be viewed in its entirety to determine whether or not the jury *could have been misled* by the objected to portions. Similarly, in *United States v. Tagalicud,* 84 F.3d 1180 (9th Cir. 1996), the court held that in reviewing formulations of jury instructions, it reviews the instructions for an abuse of discretion to determine whether the instructions taken as a whole were misleading. Also, the eleventh circuit in *United States v. Starke,* 62 F.3d 1374, 1375 (11th Cir 1995), held that it examines the jury charge as a whole to determine whether the instructions sufficiently instructed the jurors so that they understood the issues and were not misled. In addition, all of the circuits which apply a more lenient test in the civil context, also apply a more deferential standard of review in the criminal context. For example, in *United States v. Smith,* 13 F.3d 1421 (10th Cir. 1994), the court held that the appropriate standard for review of challenges to jury instructions is whether the jury, considering the instructions as a whole, was misled. This deferential standard of review should also be applied in determining issues which impinge on a plaintiff's constitutional rights.

Some commentators have argued for a single standard of appellate review for both criminal and civil cases, however, other commentators argue that the review of error should complement the standard of proof at the trial level. 1 Wigmore, Evidence §21 (3d ed. 1940). It is clear that the standard of review in several circuits depends on whether the proceedings are criminal or civil. One rational is that the more deferential standard is appropriate in criminal cases due to the fundamental constitutional rights which are implicated. Here, the fundamental rights of due process and freedom of speech are implicated. Whatever test is adopted, in cases dealing with constitutional issues, there should be a consistent test to ensure that all parties receive the same constitutional protection in all circuit courts of appeals.

The *Mijalis* case is the only case relied upon by the court below to determine the standard of review to be applied to errors in jury instructions. *Federal Deposit Ins. Co., v. Mijalis,* 15 F.3d 1314 (5th Cir. 1994). That case is factually dissimilar to this case as it deals with a jury instruction on gross negligence which the *Mijalis* court stated to be an accurate recitation of the law at the time. Therefore, the parties could not possibly suffer prejudice if there was no erroneous or conflicting jury instructions to mislead the jury. Furthermore, the *Mijalis* case dealt with unsafe lending practices not the burden of proof in constitutional cases. In this case, the court of appeals acknowledged that the special interrogatories did not adequately inform the jury of the respective parties' burden of proof but failed to find that in reviewing the jury charge as a whole, there was substantial and ineradicable doubt that the jury was misled as to the correct law to be applied. The court of appeals affirmed the erroneous jury charge notwithstanding the fact that the special interrogatories clearly contradict and were inconsistent with the general instructions in the overall charge.

If the court of appeals applied a less stringent test, in this case, it would have found that the jury instructions as a whole created a misleading impression or inadequate understanding of the law because they did not adequately guide the jury in

their deliberations on the burden of proof. In factually similar cases, the courts have frequently reversed judgment due to errors in jury instructions. For example, in *United States v. Easley,* 942 F.2d 405, 411 (6th Cir. 1991), the district court erred in instructing the jury in a portion of the jury charge on the standard to determine obscene material. Consequently, the court reversed the judgment because two conflicting instructions created considerable confusion in the jury as to what standards they were to apply to the materials. The court found that the instructions as a whole, did not adequately clarify for the jury the correct standards for analysis of the materials.

In this case, the special interrogatories erroneously placed the entire burden of proof, to prove sole cause of termination, on ZYZY, Inc., and failed to instruct the jury on the City's burden of proof. These interrogatories conflicted with the correct general instructions made elsewhere in the charge and this conflict was likely to mislead the jury as to the appropriate standard of review. The jury was only allowed to answer the erroneous special interrogatories and thus was prohibited from following the conflicting general instructions.

Therefore, ZYZY, Inc., was held to a higher burden of proof than the law requires. The application of a less stringent test would have revealed that the contradictory jury instructions created considerable confusion as to ZYZY, Inc's., required burden of proof and would have resulted in a reversal of the judgment.

B. EVEN IF THIS COURT FINDS THAT THE "SUBSTANTIAL AND INERADICABLE DOUBT" TEST IS THE CORRECT TEST TO APPLY, IT SHOULD CLARIFY HOW THIS TEST SHOULD BE APPLIED BY THE CIRCUIT COURTS OF APPEALS.

Alternatively, even if this court concludes that the "substantial and ineradicable doubt" test is the correct test to be applied then it should clarify how this test operates because it is unclear whether harmless error analysis is included in the "substantial and ineradicable doubt" test or whether it is an

additional prong that an aggrieved party must satisfy to obtain a reversal. It is well settled that even if the jury instructions are erroneous, a judgment will not be reversed if the error was harmless because such error does not affect the outcome of the case. Where a portion of a jury charge is erroneous, if the point is explained and corrected in other parts of the charge so that the jury will not be misled, the jury's verdict should be affirmed. *Cincinnati Fluid Power Inc., v. Rexnord Inc.*, 797 F.2d 1386, 1391 (6th Cir. 1986). However, a substantial and prejudicial error in a single jury instruction may warrant reversal. *Miller v. Utica Mill Speciality Mach. Co.*, 731 F.2d 305, 307 (6th Cir. 1984). In some circuits that apply the "substantial and ineradicable doubt" test, the courts of appeals conduct a two-part analysis in reviewing jury instructions. First, the court determines if the charge as a whole creates a substantial and ineradicable doubt whether the jury has been properly guided in its deliberations, and second, if error is found, the court determines if the error is harmless. In other cases, courts merely require the aggrieved party to show that the charge as a whole creates substantial and ineradicable doubt as to whether the jury has been properly guided in its deliberations. In the latter analysis, harmless error is either absent from this inquiry or is included in the inquiry, and there is no additional prong to determine whether a judgment should be reversed. See. e.g., *Woodall v. City of El Paso,* 950 F.2d 255 (5th Cir. 1992) and *Seitman Assoc., v. R..J. Reynolds Tobacco Co.*, 837 F.2d 1527 (11th Cir. 1988).

In *Nat'l Union Fire Ins. Co., v. Cagle,* 68 F.3d 905 (5th Cir. 1995), the court specifically held that to succeed in its challenge, National Union must satisfy a two-part test. First, it must prove that the jury instructions as a whole created a substantial and ineradicable doubt as to whether the proffered instruction is a correct statement of the law and once it has proven this, it must show that the error affected the outcome of the case. However, in *Woodall,* 950 F.2d 255, 260 (5th Cir. 1992), the court stated that it will only reverse and remand if the charge as whole creates a substantial and ineradicable doubt as to whether the jury had been properly guided in its deliberations. In that case, the court did not determine

whether the proffered instruction affected the outcome of the case, but found that the trial court's instructions created substantial and ineradicable doubt that the jury was insufficiently guided in the special interrogatories related to what land could be considered "available" for First Amendment purposes. Similarly, in *Bradshaw v. Freightliner Corp.*, 937 F.2d 197, 200 (5th Cir. 1991), the court held that the proper inquiry was "whether the jury charge as a whole misled, prejudiced or confused the jury and when the charge leaves the court with substantial and ineradicable doubt as to whether the jury has been guided in its deliberations, the judgment will be reversed." Once again, the court reversed without engaging in any additional harmless error analysis. Similarly, the Eleventh Circuit Court of Appeals in *Seitman Assoc., v. R..J. Reynolds Tobacco Co.*, 837 F.2d 1527 (11th Cir. 1988), applied the "substantial and ineradicable doubt" test to determine whether reversal of a judgment was necessary due to erroneous jury instructions but did not apply harmless error analysis. The Court of Appeals for the Seventh Circuit also seems to combine the "substantial and ineradicable" doubt" test with harmless error analysis. In *Binks Mfg. v. Nat'l Presto Indus. Inc.*, 709 F.2d 1109, 1116 (7th Cir. 1983), the court held that "When the instructions, taken together, properly express the law applicable to the case, there is no error even though an isolated clause may be inaccurate ... an erroneous instruction is not otherwise reversible unless the court is left with substantial and ineradicable doubt as to whether the jury was properly guided in its deliberation."

Here, regardless of whether harmless error is part of the "substantial and ineradicable doubt" analysis or is absent from this analysis, the court erroneously required ZYZY, Inc., to go through an unnecessary hurdle to successfully obtain reversal of the judgment. An aggrieved party is entitled to have the jury instructed on the burden of proof to be carried by the respective parties. A district judge has a duty to "instruct the jurors, *fully and correctly* on the applicable law of the case, and ... guide, direct , and assist them toward an intelligent understanding of the legal and factual issues involved in their search for the truth." *Woodall,* 950 F.2d 255 at 260. The

failure to instruct the jury on the appropriate burden of proof to be carried by the City denied ZYZY, Inc., the right to a fair trial.

2. EVEN IF THE FIFTH CIRCUIT APPLIED THE CORRECT TEST, IT ERRED IN NOT FINDING THAT THERE WAS A SUBSTANTIAL AND INERADICABLE DOUBT THAT THE JURY WAS PROPERLY GUIDED IN ITS DELIBERATIONS.

In light of the overwhelming testimony in favor of ZYZY, Inc., it is clear that the jury was not properly guided in its deliberations on ZYZY, Inc's burden of proof. The special interrogatories allowed a verdict for the Plaintiffs if, and only if, the jury found that a retaliatory motive was the *sole* reason for terminating the Plaintiffs. On the contrary, the general jury instructions correctly instructed the jury that it need only find a retaliatory motive as *one* of the reasons for terminating the Plaintiffs. In essence, the special interrogatories effectively precluded the jury from being able to apply the general instructions. In factually similar cases involving conflicting jury instructions or incomplete jury instructions, the courts have almost always held that the jury has not been sufficiently guided in its deliberations.

In *Woodall*, 950 F.2d 255, the court applied the substantial and ineradicable doubt test and found that the failure to give the jury a complete description of what land could be considered "available" for First Amendment purposes resulted in the jury not being sufficiently guided as to certain crucial issues. *Id.* at 260. Similarly, in this case, the failure to instruct the jury on the City's burden of proof resulted in the jury not being sufficiently guided as to the proper burden of proof to be carried by the respective parties. In *Houston v. Herring,* 562 F.2d 347 (5th Cir. 1977), the court held that even though correct instructions were submitted to the jury on strict liability, these instructions conflicted with other instructions which erroneously required a finding of negligence as a prerequisite to a verdict for the plaintiff. Therefore, the court found a substantial and ineradicable doubt that there was sufficient

opportunity for jury confusion, and remanded for a new trial. Furthermore, in *Easley,* 942 F.2d 405 at 411, the court, in reviewing conflicting jury instructions on the standard to be applied to determine whether printed material is obscene, reasoned that the instructions created considerable confusion in the jury as to what standards to apply, and consequently reversed and remanded for a new trial. Here, the court of appeals should have adopted the reasoning of the *Easley* court and reversed and remanded for a new trial because the effect of the conflicting jury instructions on the burden of proof clearly created considerable confusion among the jurors as to ZYZY, Inc., burden of proof.

The conflicting jury instructions misguided the jury as the jury charge correctly instructed the jury that it need only find a retaliatory motive as *one* of the reasons for terminating the plaintiff and ZYZY, Inc., showed a retaliatory motive for terminating "The Guide" as the official newspaper, however, even though the plaintiffs satisfied their burden of proof , the jury returned a verdict in favor of the defendants. The erroneous special interrogatories misled the jury as to the Plaintiffs' burden of proof. Reversal of the judgment was warranted as the jury heard and viewed evidence which clearly satisfied the requirements of the *Mt. Healthy* burden of proof test. For example, the record shows that the mayor stated that "he did not want to continue funding a newspaper that was negative regarding his actions and the city's actions." (R.v.6, p.299). Furthermore, in trying to establish a non-retaliatory motive, the Defendants argued that a competing newspaper had a lower bid, however, the Plaintiffs' expert witness established, using the industry standard formula, that the Plaintiffs' bid was the lower bid and better value (P.Ex. 81; R.v.8, p.770 at 1n.1-13).

It is clear that the special interrogatories misled and confused the jury as to the respective parties' burden of proof in this case. These errors, in light of the uncontroverted and overwhelming testimony in favor of ZYZY, Inc., are harmful, substantial and prejudicial. Therefore, reversal of the judgment is warranted.

CONCLUSION AND PRAYER

For the foregoing reasons, Petitioner ZYZY, Inc., respectfully prays that the Petition for a Writ of *Certiorari* be granted, and upon granting this writ, to vacate the judgment and remand this case to the district court for a new trial, or in the alternative, to remand to the court of appeals with instructions to apply the "likely to mislead" standard of review, along with such other and further relief as this Court may deem just and proper.

HENRY J. ACKELS
ACKELS AND ACKELS, L.L.P.
200 Embassy Court
624 North Good-Lattimer Expressway
Dallas, Texas 75204
(214) 826-1111

Attorneys for Petitioners

Dated: Dallas, Texas
September 17, 1997

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-50208

ZYZY, INC.; ZYZY, INC., doing business as Guide Publishing Co; REX S. MCBEATH, Individually,

Plaintiffs-Appellants-Cross-Appellees,

VERSUS

CITY OF EAGLE PASS; RAUL TREVINO, Individually and in Official Capacity; JOSE MORA, Individually and in Official Capacity; JOSE FRANCISCO FARIAS, Individually and in Official Capacity,

Defendants-Appellees-Cross-Appellants.

****

No. 96-50358

ZYZY, INC.; ZYZY, INC., doing business as Guide Publishing Co; REX S. MCBEATH,

Plaintiffs-Appellees-Cross-Appellants,

VERSUS

CITY OF EAGLE PASS; RAUL TREVINO, Individually and in Official Capacity; JOSE MORA, Individually and in Official Capacity; JOSE FRANCISCO FARIAS, Individually and in Official Capacity,

Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court
For the Western District of Texas
(DR-94-CV-70)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:[1]

Plaintiffs ZYZY, Inc., ZYZY, Inc. d/b/a Guide Publishing Co., and Rex S. McBeath, individually, brought this suit alleging that defendants City of Eagle Pass, Raul Trevino, Jose Mora and Joe Francisco Farias violated their constitutional rights of freedom of speech and freedom of the press under the First and Fourteenth Amendments and 18 U.S.C. § 1983. ZYZY, Inc. owns *The Eagle Pass News Guide ("The Guide"),* a local newspaper in Eagle Pass, Texas. Rex S. McBeath is the publisher and editor of *The Guide.* For over 30 years *The Guide* had published all city advertisements and public notices and, in the 1960's, *The Guide* was designated, by city ordinance, as the "official newspaper" of Eagle Pass.

Beginning in April 1993, *The Guide* published a series of articles reporting that Farias and Mora had improperly used city property for personal benefit and that Farias created a city job for Mora as a personal favor. In the spring of 1994, Mora and Farias ran for city council and Trevino sought election as mayor. *The Guide* published a series of editorials opposing the candidacy of all three defendants.

None of the defendants were particularly pleased by these articles and editorials. Despite the "bad press," all three defendants were eventually elected. Upon their election, Mayor Trevino and Council Members Mora and Farias constituted a majority of the five-member city council.

At their first meeting on June 17, 1994, the city council fired Susana Gomez as city manager. During the election, Gomez had adopted an "open information" policy with *The Guide* and had been sharing public information with the press about the governmental affairs of Eagle Pass. Two months

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[1] Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

later, Mayor Trevino raised the issue of designating a new "official" city newspaper. Bid requests were sent out and *The News Gram ("The Gram")* submitted the lowest bid. In October 1994, *The Gram* was designated as the new "official newspaper" of Eagle Pass. Immediately thereafter, all advertising and public notices were switched from *The Guide* to *The Gram.*

In December 1994, plaintiffs brought this suit in federal court alleging that the City had retaliated against *The Guide* for publishing a series of critical news articles and editorials during the City's mayoral and council elections. The plaintiffs allege that the defendants retaliated against *The Guide* by withdrawing all advertising and public notices, and the revenue associated therewith, and by designating *The Gram* as the City's new official newspaper.

After a jury trial, a verdict was returned in favor of the defendants. The plaintiffs filed a timely notice of appeal. On appeal, the plaintiffs contend that the jury charge was prejudicial because questions 1, 1A, and 2 misstate the *Mt. Healthy*[2] burden shifting test. Further, plaintiffs argue that the jury's verdict was against the great weight of the evidence.

In a companion case, the City, Mayor Trevino, Mora and Farias appealed from the district court's decision sustaining *The Guide's* objections to certain costs for exemplification and copies of papers obtained for use in this case. The defendants also appealed from the district court's order sustaining *The Guide's* objections to fees for witnesses relating to subpoenas, attendance, subsistence, and mileage.

ANALYSIS

The plaintiffs first contend that the district court submitted erroneous and prejudicial instructions to the jury. The standard of review for challenges to the district court's jury instructions is set forth in ***F.D.I.C. v. Mijalis,*** 15 F.3d 1314,

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[2] *Mt. Healthy v. Doyle,* 429 U.S. 274 (1977).

1318 (5th Cir. 1994). In ***Mijalis,*** we held that the challenges must show that the charge as a whole creates "substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." *See* ***id.*** Second, even if the jury instructions were erroneous, we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case. ***Id.*** at 1318.

Both parties agree that the ***Mt. Healthy*** **v.** ***Doyle,*** 429 U.S. 274 (1977), burden shifting test governs the propriety of these instructions. Under ***Mt. Healthy,*** the burden rests first on the plaintiff to show that the conduct was constitutionally protected and that the conduct was a substantial or motivating factor in the adverse action taken by the defendant. ***Id.*** at 287. Once established, the burden shifts to the defendants to show that they would have taken the same action against the plaintiffs anyway, even in the absence of the protected speech.

Plaintiffs contend that the jury questions 1, 1A, and 2, on the verdict form misstate the applicable law because these questions required the plaintiffs to show that their protected speech about the defendants was the sole factor, instead of a substantial or motivating factor, in the defendants' actions taken against them. Plaintiffs also argue that the jury questions did not shift the burden to the defendants and require them to show that they would have taken the same action even in the absence of the plaintiffs' protected activity.

After reviewing the jury instructions submitted in this case, we cannot say that the charge as a whole created "substantial and ineradicable doubt" as to whether the jury was properly guided in its deliberations. The jury was instructed to "keep in mind" the jury instructions while answering those questions. The jury instructions properly set forth the ***Mt. Healthy*** test. While we agree with the plaintiffs that the jury questions themselves do not accurately state the law, the jury instructions properly set forth the applicable test and, when read together, correctly convey the law. Therefore, we cannot say that the challenged instructions as a whole created "substantial and ineradicable doubt whether the jury has been

properly guided in its deliberations." ***Mijalis,*** 15 F.3d at 1318. As such, we affirm the district court's proffered instructions to the jury.[2]

The plaintiffs also contend that insufficient evidence exists to support the jury's verdict. In reviewing the propriety of a jury verdict, we must uphold the verdict "[u]nless the evidence is of such quality and weight that reasonable and impartial jurors could not arrive at such a verdict." ***Ham Marine, Inc. v. Dresser Indus., Inc.,*** 72 F.3d 454, 459 (5th Cir. 1995) We look to determine whether there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did. *See* ***Hiltgen v. Sumrall,*** 47 F.3d 695, 699–700 (5th Cir. 1995) Having reviewed the transcript, briefs, and other relevant portions of the record, we hold that adequate and sufficient evidence exists to support the jury's verdict in this case. As such, we affirm the district court's entry of judgment on the verdict.

Finally, in a companion case, the defendants appeal from the district court's refusal to assess certain costs against the plaintiffs. The defendants contend that the district court erred in refusing to assess the Bexar County Law Library copying charge of $8.80, the $59.00 certified copying expense incurred during trial, and the $1,315.78 outside vendor copying costs. Defendants also argue that the district court abused its discretion by denying defendants' subpoena service fees, witness attendance fees, mileage costs and sustenance payments for Ricardo Calderon, Guadalupe Cardona, Romelia Cardona, Ruth Cedillo, Arturo Garcia, Roberto Gonzalez, Celestino Hermandez, Graciela Carrillo Mazuka, Margaret McBeath, Leo Perez, Eduardo Trevino, Francisco Villa, Don Williams, and Lyndell Williams. Further, the defendants seek to recover costs for the individually named defendants who testified at trial.

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[2] Plaintiffs also contend that the district court's instruction as to the First Amendment rights of public officials was erroneous. Finding no error in the instruction, we affirm.

We review the district court's award of attorney's fees and costs for abuse of discretion and the supporting fact findings for clear error. *See* ***Riley v. City of Jackson, Mississippi,*** 99 F.3d 757, 831 (5th Cir. 1996). Plaintiffs argue that these costs were not shown to be necessary under 28 U.S.C. § 1920. And *see* ***Holmes v. Cessna Aircraft Co.,*** 11 F.3d 63, 64 (5th Cir. 1994) (the party seeking copying costs must offer some proof of necessity). Plaintiffs also contend that, because these witnesses did not testify at trial, the defendants were required to show that the witnesses were prepared to testify but extrinsic circumstances rendered their testimony unnecessary. Plaintiffs maintain the district court properly found that the defendants failed to show that their testimony was necessary. Further, plaintiffs assert that the named parties' costs are not recoverable under 28 U.S.C. § 1920 and the district court did not err by refusing to assess their costs to the plaintiffs.

With respect to the defendants' copying costs, the district court found that the defendants failed to explain the necessity of these costs, the number of pages copied, or the rate charged per page. The only explanation offered by the defendants for the $1,315.78 in outside vendor costs was that "the rate per copy charged by outside copying firms is typically less than $.15 per page." The district court found this explanation to be insufficient to establish necessity in this case. The district court also found that the defendants failed to show why each of the above witnesses' testimony was necessary or what circumstances made their testimony at trial unnecessary.[3]

After reviewing the record, testimony, and the parties' briefs on appeal, we find no clear error with the district court's factual findings concerning costs and we cannot say that the district court abused its discretion in refusing to assess the costs sought by the defendants on appeal. We further find that the district court did not err in awarding other costs

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[3] On cross-appeal, the plaintiffs contend that the district court erred in awarding defendants the costs of copying depositions and condensed versions of depositions.

associated with this case including the costs of copying depositions and of condensing certain versions of depositions. As such, we affirm the district court's assessment of costs in this case.

CONCLUSION

For the foregoing reasons, the judgment of the district court should, in all things, be **AFFIRMED.**

Appendix B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

ZYZY, INC., and ZYZY, INC. d/b/a GUIDE PUBLISHING CO., and REX S. MCBEATH, Plaintiffs, vs. THE CITY OF EAGLE PASS, TEXAS; RAUL TREVINO, Individually; JOSE MORA, Individually; JOSE FRANCISCO FARIAS, Individually; RAUL TREVINO, JOSE MORA AND JOSE FRANCISCO FARIAS, In Their Official Capacities, Defendants.	)	CIVIL ACTION NO. DR-94-CA-70

COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

Now that you have heard all of the evidence, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

In this case, the Plaintiffs must prove every essential element of its claims by a preponderance of the evidence. A preponderance of the evidence means such evidence, when considered and compared with that opposed to it, has more

convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, a preponderance of the evidence simply means evidence that persuades you that the Plaintiff's claim is more likely true than not.

In deciding whether any fact has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of the Plaintiffs' claim by a preponderance of the evidence, you should find for the Defendants as to that claim.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers during argument is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you. Also, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to

base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences. Again, do not let bias, prejudice or sympathy play any part in your deliberations. A government entity, such as the City of Eagle Pass, and all other persons are equal before the law and must be treated as equals in a court of justice.

This case should be considered by and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. Do not let bias, prejudice or sympathy play any part in your deliberations. You must not decide who should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss or concern yourselves with the effect of your answers.

You should not interpret the fact that I have given instructions about the Plaintiffs' damages as an indication in any way that I believe that the Plaintiffs should or should not win this case.

There are two kinds of evidence: direct and circumstantial. Direct evidence is testimony by a witness about what that witness personally saw or heard or did. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved. You may consider both direct and circumstantial evidence in deciding this case. The law permits you to give equal weight to both, but it is for you to decide how much weight to give any evidence.

Remember that in a very real way you are the judges--judges of the facts. Your only interest is to seek the truth from the evidence in the case. In this and any lawsuit, the credibility of the witnesses is important. You are the sole judges of whether to believe or disbelieve all, part or none of the testimony of any witness. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should decide whether you believe what each person had to say, and how important that testimony was.

In making that decision, I suggest that you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the Plaintiffs or the Defendants? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say.

BACKGROUND

The plaintiffs, Zyzy, Inc. d/b/a Guide Publishing Co., and Rex S. McBeath, allege the Defendants, the City of Eagle Pass, Raul Trevino, Jose Mora, and Jose Francisco Farias withheld advertising and public notices, and persuaded other agencies to do likewise, and delayed the flow of public information from the Plaintiffs' newspaper, "The Guide," in

retaliation for critical news articles and editorials printed by the Plaintiffs in The Guide. The Plaintiffs allege the Defendants selected a competing newspaper, the "News Gram," as the City of Eagle Pass's official newspaper because the Plaintiffs' exercised their First Amendment right to free speech and free press. The Plaintiffs also allege the Defendants violated the Texas Open Meetings Act by discussing matters outside of formal meetings and then merely voting on issues during formal meetings without public discussion.

The Defendants deny that any action was taken against the Plaintiffs because they exercised their free speech and free press rights. The Defendants assert that they selected the News Gram pursuant to a competitive bidding ordinance. Moreover, the Defendants contend that this reason was not a pretext for retaliation. The Defendants also deny Plaintiffs' allegations that the Texas Open Meetings Act was violated.

LAW APPLICABLE TO THIS CASE

The Plaintiffs claims are based on a federal civil rights law commonly known as "section 1983." Section 1983 of Title 42 of the United States Code provides that any citizen may seek redress by way of damages against any person or persons who, under color of any State law or custom, subjects such citizen to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. Stated another way, section 1983 provides a remedy for persons who have been deprived of their constitutional rights under color of state law.

To establish a claim under section 1983, the Plaintiffs must establish by a preponderance of the evidence each of the following three elements:

1. First, that the alleged illegal conduct of the Defendants was committed under color of state law;

2. Second, that the alleged illegal conduct deprived the Plaintiffs of their constitutional rights of free Speech and free press as those rights are defined under the First Amendment: that the Defendants retaliated against the

Plaintiffs for the critical news articles and editorials printed in the Plaintiffs' newspaper; and

3. Third, that the alleged illegal conduct of the Defendants was an actual and proximate cause of the injuries and damages allegedly sustained by the Plaintiffs.

I shall now examine each of the three elements in greater detail.

UNDER COLOR OF STATE LAW

The first element of the Plaintiffs' claim is that the Defendants acted under color of state law. The phrase "under color of state law" is a shorthand reference to the words of section 1983, which includes within its scope action taken under color of any statute, ordinance, regulation, custom or usage, of any state (or territory or the District of Columbia). The term "state" encompasses any political subdivision of a state, such as a county or city.

Action under color of state law means action that is made possible only because the actor is clothed with the actual or apparent authority of the government, which includes a city government. An actor may misuse power that he possesses by virtue of state law even if his acts violate state law; what is important is that the Defendants were clothed with the authority of state law, and that the Defendants' action was made possible by virtue of state law.

In this case, the action in question is the vote taken in October of 1994, which awarded the City's advertising and publication business to a competing newspaper, rather than to The Guide. There is no dispute in this case that the vote of the Defendants was taken "under of color of law" The actions of the Defendants in voting on the selection of an official newspaper are actions taken pursuant to their authority as government officials, that is, members of city council.

Because the Defendants were officials of the City of Eagle Pass at the time of the acts in question, their conduct was taken under "color of law" for purposes of section 1983. In

other words, although this is a case involving individual Defendants, I am instructing you that the relationship between the Defendants and the City was sufficiently close so that the Defendants were acting under color of state law. Stated another way, the first element is satisfied.

DEPRIVATION OF A FEDERAL RIGHT

The second element of the Plaintiffs' claim is that they were deprived of a federal right by the Defendants. Here, the federal right that the Plaintiffs allege to have been deprived of is their constitutional right to freedom of speech and freedom of the press under the First Amendment of the United States Constitution.

In order for the Plaintiffs to establish this element, they must show by a preponderance of the evidence that the Defendants acted in retaliation for critical news articles and editorials printed in The Guide.

In other words, the Plaintiffs must establish each of the following two elements of their claim: (1) first, you must find by a preponderance of the evidence that the Plaintiffs engaged in conduct that qualifies as free speech protected by the First Amendment; and (2) second, you must find by a preponderance of the evidence that the specific acts of protected speech were a substantial or motivating factor in the Defendants' adverse decision to the Plaintiffs.

The first element is a question of law for the Court to decide. I have decided that the First Amendment protects Plaintiffs' speech as printed in The Guide.

The second element of the Plaintiffs' claim is that their protected speech was a substantial or motivating factor in the Defendants' decision to take action against the Plaintiffs.

The Plaintiffs' protected speech was a substantial or motivating factor in the Defendants' decision to take action against them if it played a substantial part in the actual decision to take action against the Plaintiffs.

The Defendants may have taken action for one sole reason. If that one sole reason was that the Plaintiffs printed critical articles and editorials about the Defendants, then you must find that the Plaintiffs' protected speech was a substantial or motivating factor in the Defendants' decision.

The Defendants may have taken action for many different reasons, such as selection of the lower bid. If so, then you must determine whether one of those reasons was that the Plaintiffs printed critical articles and editorials about the Defendants. If it was one of those reasons, then you must determine whether it played a substantial part in the actual decision to take action against the Plaintiffs. If it did play a substantial part, then you must find that the Plaintiffs' protected speech was a substantial or motivating factor in the Defendants' decision. If you find it did not play a substantial part, then you must find for the Defendants.

DEFENDANTS' AFFIRMATIVE DEFENSE

If you find that the Plaintiffs' protected speech was a substantial or motivating factor in each of the Defendant's decision to take action against the Plaintiffs, you must consider whether the Defendants would have taken the same action anyway, even in the absence of the protected speech. If you find that the Defendants have proven by a preponderance of the evidence that they would have made the same selection even in the absence of the free speech conduct of the Plaintiffs, then you must find for the Defendants.

INTENT

To show a violation of their constitutional right, the Plaintiffs must show that the actions of the Defendants were motivated by intentional retaliatory motive. In other words, the burden is on the Plaintiffs to show that the Defendants intended to retaliate against the Plaintiffs because of the exercise of their protected speech. If you find that the actions of the Defendants were taken out of ignorance, mistake, accident, or for any reason other than in retaliation for the exercise of Plaintiffs' First Amendment rights, then, even if you

find that the Plaintiffs were injured as a result of those acts, you must return a verdict for the Defendants.

Conduct that is not motivated by intentional retaliatory animus does not constitute a violation of Plaintiffs' constitutional rights.

An act is intentional if it is done knowingly, that is if it is done voluntarily and deliberately and not because of mistake, accident, negligence or other innocent reason. In determining whether the Defendants acted with the requisite knowledge, you should remember that while witnesses may see and hear and so be able to give direct evidence of what a person does or fails to do, there is no way of looking into a person's mind. Therefore, you have to depend on what was done and what the people involved said was in their minds and your belief or disbelief with respect to those facts.

An act is negligent if the Defendants had a legal duty that required adherence to a certain standard of conduct and they failed to use reasonable care to meet that standard.

PROXIMATE CAUSE

The third element which the Plaintiffs must prove is that the Defendants' acts were a proximate cause of the injuries alleged by the Plaintiffs. Proximate cause means that there must be a sufficient causal connection between the official act or omission of the Defendants and the injury or damage sustained by the Plaintiffs.

An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing injury, that is, if the injury or damage was a reasonably foreseeable consequence of the Defendants' act or omission. If an injury was a direct result or a reasonably probable consequence of the Defendants' acts or omissions, it was proximately caused by such acts or omissions.

The Plaintiffs must show by a preponderance of the evidence that the alleged injury would not have occurred without the conduct of the Defendants. If you find that the Defendants

have proved, by a preponderance of the evidence, that the Plaintiffs complain about an injury which would have occurred even in the absence of the Defendants' alleged illegal conduct, you must find the Defendants did not proximately cause the Plaintiffs' injury.

A proximate cause need not always be the nearest cause either in time or in space. In addition, there may be more than one proximate cause of an injury or damage. Many factors or the conduct of two or more people may operate at the same time, either independently or together to cause injury. A Defendant is not liable if the Plaintiffs' injury was caused by a new or independent source of an injury which intervenes between the Defendants' act or omission and the Plaintiffs' injury and which produces a result which was not reasonably foreseeable by the Defendants.

PUBLIC OFFICIALS

The First Amendment permits a government official to impose reasonable restrictions on speech as to top level executive employees, such as a City Manager. This is allowed in order to ensure loyalty, an effective working relationship, and the formulation of government policy by the government official. Evidence of such restrictions does not show a wrong, but is offered as circumstantial evidence of motivation or mental state as to the Defendants, which evidence may be given as much or as little weight as you, the jury, shall determine.

The First Amendment allows full discourse and debate on all subjects. Public officials are free to state their views, and may lawfully comment or criticize the press or the media. They may suggest lawful action against the press, which may legally include a boycott by private individuals. Evidence of such statements does not show a wrong, but is offered as circumstantial evidence or motivation or mental state as to the Defendants, which evidence may be given as much or as little weight as you, the jury, shall determine. However, the law does not allow them to take action as government officials based upon those views or opinions.

TEXAS OPEN MEETINGS ACT

The Texas Open Meetings Act prohibits city council members from meeting outside of formal council meetings and discussing or planning city affairs. The purpose of the Act is to encourage and promote open and public debate and discussion about issues during formal meetings so that the public can be informed. The Plaintiffs have alleged that the Defendants violated this Act by discussing matters outside of formal meetings and then merely voting on issues during formal meetings without public discussion. You may consider both direct and indirect evidence as defined above to determine this question.

You are instructed that the Texas Open Meetings Act is violated if a member or group of members knowingly conspires to circumvent the Act by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of the Act.

QUALIFIED IMMUNITY

Aside from denying the Plaintiffs' claims of constitutional violations, the individual Defendants have also raised as a defense to this lawsuit a claim of qualified immunity.

Under the law controlling civil rights complaints such as this one, public officials are entitled to raise as a defense a claim of qualified immunity from liability and damages.

The defense of qualified immunity is not an admission of guilt. Rather, it is a manifestation of the policy that the public interest is better served by officials who will not be deterred by fear of liability from executing the office with an independent and decisive judgment.

It would be unfair to impose upon public decision-makers the burden of mistakes made in good faith in the course of exercising their discretion within the scope of their official duties. This immunity is such that public officials understand that action taken in the good faith fulfillment of their

responsibilities and within the bounds of reason in the fulfillment of their duties will not be punished.

Public officials who fail to make decisions when they are needed or who do not act to implement decisions when they are made, do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity for their acts, is a recognition that they make honest errors in judgment.

An official cannot escape liability, however, if he acts with malicious intent to cause a deprivation of constitutional rights to the Plaintiffs. Thus, if you find that the Plaintiffs have proven by a preponderance of the evidence that the individual Defendants acted with illegal intent and that they know or reasonably should have known that their illegally motivated vote would be in violation of the Plaintiffs' rights of free speech, then you should find for the Plaintiffs.

If, however, you find that a reasonable official in the position of the individual Defendants would believe his actions to be lawful and appropriate, then you must find that the individual Defendants are entitled to qualified immunity.

A reasonable public official would exercise due diligence to ascertain what the law is as it relates to his conduct and would act to conform his conduct in accordance with the law.

PRETEXT

The Plaintiffs contend that the Defendants' articulated reason, that is the lower bid from the competing newspaper, for their action(s) is nothing more than a pretext for retaliation. In other words, the Plaintiffs contend the Defendants' reason is not the true reason why the Defendants took adverse action(s) against the Plaintiffs, that such reason is unworthy of belief and that the true reason for the adverse action(s) was a desire to retaliate against The Guide.

When you consider the Plaintiffs' evidence that the reason advanced by the Defendants is a pretext, keep in mind that the

relevant question is whether the Defendants' reason was not the real reason for their actions.

It is the Plaintiffs' burden to persuade you, by a preponderance of the evidence that the Defendants took the adverse action(s) against the Plaintiffs because of their desire to retaliate. If you do not believe the Defendants' explanations for their action(s), then you may infer, but are not required to infer, that the Plaintiffs have satisfied their burden of proof.

COMPENSATORY DAMAGES

If the Plaintiffs have proven their claims against the Defendants by a preponderance of the evidence, you must determine the damages, if any, to which the Plaintiffs are entitled. You should not interpret the fact that I have given instructions about the Plaintiffs' damages as an indication in any way that I believe that the Plaintiff should, or should not, win this case. It is your task first to decide whether the Defendants are liable. I am instructing you on damages only so that you will have guidance in the event you decide that the Defendants are liable and that the Plaintiffs are entitled to recover money from the Defendants.

If you find that the Defendants are liable to the Plaintiffs, then you must determine an amount that is fair compensation for all of the Plaintiffs' damages which have resulted from Defendants' discriminatory conduct. These damages are called compensatory damages. The purpose of compensatory damages is to make the Plaintiff whole--that is, to compensate the Plaintiffs for the damage that the Plaintiffs have suffered.

In this case, if the Plaintiffs win, they are entitled to compensatory damages for lost profits, injury to their business reputation and personal reputation, mental anguish and emotional distress. The Plaintiffs are also entitled to damages for the "chilling effect" on their freedom of speech and freedom of press right. In this regard, it is the contention of the Plaintiffs that the actions of the Defendants chilled their free speech and free press rights. They contend that, due to the Defendants conduct, they were no longer able to timely and

efficiently report the news and inform the public about city affairs. The Plaintiffs also contend that the chilling effect resulted in the Plaintiffs no longer feeling free to fully exercise their right to freedom of speech and freedom of the press. This is an action which would cause the Plaintiffs to hesitate in their decisions to print the news or to change the manner in which they report the news due to their feared future retaliation.

You may award compensatory damages only for injuries that the Plaintiff proves were proximately caused by the Defendants' discriminatory conduct. The damages that you award must be fair compensation for all of the Plaintiffs' damages, no more and no less. Damages are not allowed as a punishment and cannot be imposed or increased to penalize the Defendants. You should not award compensatory damages for speculative injuries, but only for those injuries which the Plaintiff has actually suffered.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that the Plaintiff prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

The Plaintiffs have alleged that, as a result of the Defendants' intentional retaliation, they have suffered lost profits, injury to their business reputation and personal reputation, mental anguish, emotional distress, and chilling effect. The Plaintiffs have the burden of proving any compensatory damages by a preponderance of the evidence.

If you determine that the Plaintiff has proven by a preponderance of the evidence that they have experienced lost profits, injury to their business reputation and personal reputation,

mental anguish, emotional distress and chilling effect, you may award them damages for those injuries. No evidence of the monetary value of such intangible things as pain and suffering has been, or needs to be, introduced into evidence. You are not trying to determine value, but an amount that will fairly compensate the Plaintiffs for the damages they have suffered. There is no exact standard for fixing the compensation to be awarded for these elements of damages. Any award that you make should be fair in the light of the evidence. Compensatory damages do not include interest and, therefore, interest must not be considered in determining the amount of compensatory damages, if any, to award Plaintiffs.

DOUBLE RECOVERY AND COMPENSATORY DAMAGES

I have said that, if you return a verdict for the Plaintiffs, you must award such sum of money as you believe will fairly and justly compensate them for the damages that you find they sustained as a proximate result of the illegal conduct of the Defendants.

In this case, the Plaintiffs claim that the Defendants violated their rights in the following ways: the Defendants voted to award the City's advertising business to a competing newspaper in retaliation for the Plaintiffs' exercise of their First Amendment right of free speech.

If you find that the Defendants did in fact violate the Plaintiffs' rights, you must remember, in calculating the damages, that the Plaintiffs are entitled to be compensated only for lost profits, injury to business reputation and personal reputation, mental anguish, emotional distress, and chilling effect that they actually suffered.

Therefore, even if you find that the Defendants violated the Plaintiffs' constitutional rights in more than one way or on more than one occasion, but the resulting injury was no greater than what it would have been for a single instance, you should award an amount of compensatory damages no

greater than you would award if the Defendants had violated only one of the Plaintiffs' rights.

If, on the other hand, the Defendants violated more than one of the Plaintiffs' rights and you can identify separate injuries that resulted from the separate violations, you may consider an amount of compensatory damages equal to the total of the damages suffered.

NOMINAL DAMAGES

If you return a verdict for the Plaintiffs, but find that the Plaintiffs have failed to prove by a preponderance of the evidence that they suffered any economic losses, then you may return an award of nominal damages not to exceed the sum of one dollar.

Nominal damages may be awarded when the Plaintiffs have been deprived by the Defendants of a constitutional right but have suffered no actual damage as a natural consequence of that deprivation. The mere fact that a constitutional deprivation occurred is an injury to the persons entitled to enjoy that right, even when no actual damages flow from the deprivation. Therefore, if you find that Plaintiffs have suffered no injury as a result of the Defendants' conduct other than the fact of a constitutional deprivation, you may award nominal damages not to exceed one dollar.

PUNITIVE DAMAGES

In appropriate circumstances, the law allows for an award of punitive damages against individually-named Defendants. As stated above, if you find that the Defendants are liable for the Plaintiffs' injuries, you must award the Plaintiffs the compensatory damages that they have proven. You also may award punitive damages, if the Plaintiffs have proved by clear and convincing evidence that the individual Defendants acted with malice or willfulness or with callous and reckless indifference to the rights of others. "Clear and convincing" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. One acts willfully or

with reckless indifference to the rights of others when he acts in disregard of a high and excessive degree of danger about which he knows or which would be apparent to a reasonable person in his condition.

If you determine that the individual Defendants' conduct was so shocking and offensive as to justify an award of punitive damages, you may exercise your discretion to award those damages. In making any award of punitive damages, you should consider that the purpose of punitive damages is to punish a Defendant for shocking conduct, and to deter the Defendant and others from engaging in similar conduct in the future. The law does not require you to award punitive damages. However, if you decide to award punitive damages, you must use sound reason in setting the amount of the damages. The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party. However, the amount can be as large as you believe necessary to fulfill the purposes of punitive damages. You may consider the financial resources of the Defendants in fixing the amount of punitive damages, and you may impose punitive damages against one or more of the individual Defendants, and not the other, or against more than one individual Defendant in different amounts.

The award of a nominal sum for compensatory damages would not preclude your awarding punitive damages in such amount as you deem appropriate, if you find that the award of punitive damages is justified.

FINAL INSTRUCTIONS

Any notes that you have taken during this trial are only aids to memory. If your memory should differ from your notes, then you should rely on your memory and not your notes. The notes are not evidence. A juror who has not taken notes should rely on his or her independent recollection of the evidence and should not be unduly influenced by the notes of others. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

Upon retiring to the jury room you should first select one of your number to act as your presiding juror who will preside over your deliberations and will be your spokesperson here in court. A form of verdict has been prepared for your convenience.

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your presiding juror fill it in, date and sign it, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the presiding juror, and pass the note to Mr. Reyna who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

FRED BIERY
UNITED STATES DISTRICT JUDGE

Date

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

ZYZY, INC., and ZYZY, INC. d/b/a GUIDE PUBLISHING CO., and REX S. MCBEATH, Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. DR-94-CA-70
THE CITY OF EAGLE PASS, TEXAS; RAUL TREVINO, Individually; JOSE MORA, Individually; JOSE FRANCISCO FARIAS, Individually; RAUL TREVINO, JOSE MORA and JOSE FRANCISCO FARIAS, In Their Official Capacities, Defendants.	)	

VERDICT

Keeping in mind the foregoing instruction, please answer the following:

Question No. 1.

Do you find from a preponderance of the evidence that the following Defendants intentionally withheld City of Eagle Pass advertising and public notices from The Guide in retaliation for the critical news articles and editorials printed by the Plaintiffs in The Guide and would have selected The Guide instead of the News Gram as the City of Eagle Pass's official newspaper but for the Plaintiffs' exercise of their First Amendment right to free speech and free press?

Answer "Yes" or "No."

Raul Trevino: _____

Francisco (Paco) Farias: _____

Jose (Joe) Mora: _____

Question No. 1A.

Do you find from a preponderance of the evidence that the following Defendants intentionally persuaded other Eagle Pass public agencies to withhold advertising and public notices from The Guide in retaliation for the critical news articles and editorials printed by the Plaintiffs in The Guide and that the other Eagle Pass public agencies would have advertised and placed public notices in The Guide but for the persuasion of the Defendants?

Answer "Yes" or "No."

Raul Trevino: _____

Francisco (Paco) Farias: _____

Jose (Joe) Mora: _____

Answer Question No. 1B only if you have answered "Yes" with regard to one or more of the individuals listed in Question No. 1A. Otherwise, do not answer Question No. 1B.

Question No. 1B.

What sum of money if paid now in cash, if any, will fairly and reasonably compensate ZYZY, Inc. for the lost profits that the Plaintiffs proved resulted from the retaliatory conduct, if any, of the Defendants you answered "Yes" to in Question No. 1A?

Answer in dollars and cents, if any:

$ _____

Question No. 2.

Do you find from a preponderance of the evidence that the following Defendants intentionally obstructed or delayed the flow of city information to the Plaintiffs' news reporters in retaliation for the critical news articles and editorials printed by the Plaintiffs in The Guide?

Answer "Yes" or "No."

Raul Trevino: _____

Francisco (Paco) Farias: _____

Jose (Joe) Mora: _____

Answer Question No. 3 only if you answered "Yes" with regard to one or more of the individuals listed in Question No. 1. Otherwise, do not answer Question No. 3.

Question No. 3.

If you answered "Yes" to an individual listed below, have defendants proved by a preponderance of the evidence that a reasonable public official, acting in the same or similar position as the individually named Defendants could reasonably have believed that the selection of the News Gram over The Guide as the City of Eagle Pass's official newspaper, would not be a violation of Plaintiffs' free speech or free press right?

Answer "Yes" or "No."

Raul Trevino: _____

Francisco (Paco) Farias: _____

Jose (Joe) Mora: _____

Answer Question No. 4 only if you answered "Yes" with regard to one or more of the individuals listed in Questions No. 1 and 2 and only if you answered "No" to Question No. 3. Otherwise, do not answer Question No. 4.

Question No. 4.

What sum of money if paid now in cash, if any, will fairly and reasonably compensate the Plaintiffs for their damages that they proved resulted from the retaliatory conduct of the Defendants?

Provide the amount to be awarded the Plaintiffs to place them in the position they would have been in had they not been subjected to the retaliatory conduct.

Answer in dollars and cents, if any, for:

lost profits, injury to business reputation and personal reputation, mental anguish, emotional distress, and chilling effect which the Plaintiffs proved by a preponderance of the evidence that they suffered as a direct result of the Defendants' retaliatory conduct.

ZYZY Inc. d/b/a Guide Publishing Co.:

lost profits: $ _____

injury to
business reputation: $ _____

chilling effect: $ _____

Rex McBeath:

injury to
personal reputation: $ _____

chilling effect: $ _____

mental anguish
and emotional distress: $ _____

Question No. 5.

Do you find from a preponderance of the evidence that the Defendants knowingly conspired to circumvent the Texas Open Meetings Act by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of the Act as related to the issue of city advertising?

Answer "Yes" or "No."

_____

Question No. 6.

What sum of money if paid now in cash, if any, will serve as an example to others and punish the Defendants for their alleged illegal conduct?

Provide the amount to be awarded if you find by clear and convincing evidence that the individual Defendants acted with

malice or wilfulness or with callous and reckless indifference to Plaintiffs' rights.

Answer in dollars and cents, if any, for:

Raul Trevino: $ _____

Francisco (Paco) Farias: $ _____

Jose (Joe) Mora: $ _____

SO SAY WE ALL

_____

PRESIDING JUROR

_____

Date

(2)

No. 97-540

Supreme Court, U.S.
FILED
OCT 27 1997
CLERK

In The

Supreme Court of the United States

October Term, 1997

ZYZY, INC., and ZYZY, INC., d/b/a GUIDE PUBLISHING CO.; and REX S. MCBEATH,

Petitioners,

v.

CITY OF EAGLE PASS, TEXAS; RAUL TREVINO, Individually; JOSE MORA, Individually; JOSE FRANCISCO FARIAS, Individually; RAUL TREVINO, JOSE MORA, and JOSE FRANCISCO FARIAS, In Their Official Capacities,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

MARCI A. HAMILTON, ESQ.
482 Kings Road
Yardley, PA 19067
(215) 493-1973
(215) 493-1094 (facsimile)
Counsel of Record

RICARDO J. NAVARRO
DENTON, MCKAMIE & NAVARRO
A PROFESSIONAL CORPORATION
1700 Tower Life Building
310 S. St. Mary's Street
San Antonio, TX 78205-3111
(210) 227-3243
(210) 225-4481 (facsimile)
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

3 pp

QUESTION PRESENTED

Whether there is a circuit split on the standard of review to be applied to jury instruction error in cases implicating constitutional rights?

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OPINION BELOW

The summary order of the court of appeals is submitted in the Petitioners' appendix "A." Pet. App. at A-1 – A-7. The order is not officially reported.

JURISDICTION

The order of the court of appeals was entered on June 27, 1997. The petition for a writ of certiorari was filed on September 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATEMENT OF THE CASE

For thirty years, The News Guide ("The Guide") was the only newspaper in Eagle Pass, Texas that satisfied the requirements under state law to carry public and legal notices for the City. *See* Tex. Gov't Code Ann. § 2051.044 (West 1997). Thus, The Guide was the only newspaper that carried the City's public notices. The Guide existed in this competition-free marketplace for many years. The market for public and legal notices and other city advertising became more competitive in 1991 when The News Gram ("The Gram") requested the City's advertising business. Def.'s Trial Ex. 6A. In 1993, the city attorney rendered a legal opinion that The Gram was legally qualified under state law to carry public and legal notices and other advertising. Def's Trial Ex. 6I. In 1994, the City was notified by the Texas Press Association that The Gram qualified under state law to carry such notices. Def.'s

Trial Ex. 12B. By 1993, The Gram started to get a small portion of the City's business from time to time. The City was then faced with the dilemma of how to choose between the two newspapers for the bulk of its business.

Upon the advice of its city attorney that it was required to do so, on June 28, 1993, the City adopted Ordinance No. 93-12, which set in place a competitive bidding process for its public notice business. *See* Resp. App. at 1-3. Although state law did *not* require such a procedure for home rule cities, like Eagle Pass, but rather only for a certain type of general-law city, *see* Tex. Local Gov't Ann. §§ 52.001, 52.004 (West 1997), neither state nor federal law prohibited such a procedure for Eagle Pass. *See* Resp. App. at 5-7.

Pursuant to Ordinance 93-12, the City held a competitive bid for its public notice business in September of 1994. The Gram submitted the lower bid. As a result, the City committed all of its legal and public notice business to The Gram for the 1994-95 fiscal year. Def's Trial Ex. 7B.

The Guide subsequently filed this lawsuit in December 1994 to recapture the City's business. The Guide claimed that the City switched its legal public notice business in retaliation for The Guide's negative editorials regarding city officials who voted on the competitive bids. After an intensive, one-week trial, a great deal of testimony on both sides, and the entry of numerous, voluminous documentary exhibits into evidence, the jury found in favor of the City. Pet. App. at A-3.

Before sending the case to the jury, the trial court determined that the case was appropriately treated as a

case implicating First Amendment rights and that the parties' relative burdens were governed by *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), which dealt with the retaliatory dismissal of public employees, and *North Miss. Communications, Inc. v. Jones*, 874 F.2d 1064 (5th Cir. 1989), which applied the *Mt. Healthy* standard to the withholding of public patronage by a government entity in retaliation for critical media coverage of the government entity's conduct.

There is no dispute that the general charge to the jury in this case was correct under the *Mt. Healthy* burden-shifting standard. Pet. App. at A-4. In the general charge, the district court instructed the jury appropriately on the relative burdens of the parties, Pet. App. at A-12 – A-17, and directed the jury to consider the jury instructions as a whole: "It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole." Pet. App. at A-8.

Although the court of appeals found that the *Mt. Healthy* test was stated correctly in the general charge to the jury, the parties, under a great deal of time pressure, agreed to last-minute changes in the jury questions, which then misstated the *Mt. Healthy* test. Pet. App. at A-26 – A-28.

In an unpublished per curiam opinion, the court of appeals upheld the jury's verdict, stating that the instructions, taken as a whole, "correctly convey the law." Pet. App. at A-4. The court reasoned: "The jury was instructed to 'keep in mind' the jury instructions while answering th[e jury] questions. The jury instructions properly set forth the *Mt. Healthy* test. While we agree with the plaintiffs that the jury questions themselves do not accurately

state the law, the jury instructions properly set forth the applicable test and, when read together, correctly convey the law." Pet. App. at A-4.

Having learned that its competitive bidding process was not required by state law and having endured this lawsuit in the wake of its first attempt to employ a competitive bidding process, the City decided on August 26, 1996 to repeal Ordinance 93-12. *See* Eagle Pass, Tex., Ordinance No. 96-16; Resp. App. at 8-10. In its place, the City has decided to alternate between The Guide and The Gram on a semi-annual basis. Resp. App. at 11. Both The Guide and The Gram were notified of the new policy by letter dated January 14, 1997. Resp. App. at 13, 14. Under the new plan, the Guide carried the City's public notices from January 15, 1997 through July 14, 1997. The Gram commenced carrying notices on July 15, 1997 and will carry them until January 14, 1998. Resp. App. at 11. The City has pledged to "make every effort to distribute all of its other advertising equally amongst all the News Media" and has decided not to designate "any print media as the City's official newspaper." Resp. App. at 11.

ARGUMENT

This case involves no circuit split and no important federal question requiring this Court's attention.

A. There Is No Circuit Split on the Standard of Review to Be Applied to Jury Instruction Error in Cases Implicating Constitutional Rights

In an attempt to manufacture a circuit split, Petitioner has mixed apples with oranges. The "likely to mislead" standard relates to the *jury's* state of mind and is applied by the reviewing court to assess whether the trial court's erroneous instructions were likely to confuse or mislead the jurors. In contrast, the "substantial and ineradicable doubt" standard addresses the level of certitude that the *appellate court* should have regarding the jury's confusion before it reverses a verdict reached in the wake of erroneous instructions. Neither standard is the subject of a circuit split.

The court in *Davis v. Ector County, Texas* properly explained the distinction:

> "The function of the reviewing court with respect to instructions is to satisfy itself that the instructions show no tendency to confuse or mislead the jury with respect to the applicable principles of law." . . [W]e will reverse if we conclude that the trial court erred with respect to the instructions proffered to the jury and that, based upon the record, the error affected the outcome of the case. In other words, does the charge "as a whole leave[] us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations"?

40 F.3d 777, 786 (5th Cir. 1994) (citations omitted).

1. The "Likely to Mislead" Standard

The "likely to mislead" standard identifies those erroneous jury instructions that should be considered for reversal. As one court observed: "On review of a trial court's charge to the jury, we must determine 'not whether the charge was faultless in every particular', but whether the jury was misled in any way and whether it had a correct understanding of the issues." *Bueno v. City of Donna*, 714 F.2d 484, 490-91 (5th Cir. 1983) (citation omitted). There is no competing standard on this issue. Indeed, despite the many instances of challenges to erroneous jury instructions, no court of appeals has ever stated that there was a split in the circuits on the question of the standard of review to be applied when jurors receive erroneous jury instructions. The Court's intervention in this settled area of the law is unnecessary.

All circuits that have spoken to the issue, including the Fifth Circuit, employ the "likely to mislead" standard for erroneous jury instructions in cases implicating constitutional rights. *See, e.g., Tatro v. Kervin*, 41 F.3d 9 (1st Cir. 1994); *Anderson v. Branen*, 17 F.3d 552, 556 (2d Cir. 1994); *United States v. Johnstone*, 107 F.3d 200, 204 (3d Cir. 1997); *Davis*, 40 F.3d at 786; *United States v. Pace*, 10 F.3d 1106, 1120-21 (5th Cir. 1993), *cert. denied*, 511 U.S. 1149 (1994); *Woodall v. City of El Paso*, 950 F.2d 255, 261 (5th Cir.), *cert. denied*, 506 U.S. 908 (1992); *Bueno*, 714 F.2d at 490-91; *Innes v. Howell Corp.*, 76 F.3d 702, 714 (6th Cir. 1996); *United States v. Easley*, 942 F.2d 405, 411 (6th Cir. 1991); *Doe v. Burnham*, 6 F.3d 476, 479 (7th Cir. 1993); *Westborough Mall, Inc. v. City of Cape Girardeau*, 794 F.2d 330, 335 (8th Cir.), *cert. denied*, 461 U.S. 945 (1986); *Masson v. New Yorker Magazine, Inc.*, 85 F.3d 1394, 1397 (9th Cir.

1996); *Gardetto v. Mason*, 100 F.3d 803, 816 (10th Cir. 1996); *Morro v. City of Birmingham*, 117 F.3d 508, 513 (11th Cir. 1997). " ' "The test is not whether the charge was faultless in every particular but whether the jury was misled." ' " *Westborough Mall*, 794 F.2d at 335 (citation omitted).

Most of the cases cited by Petitioner do not deal with constitutional issues and therefore are inapposite. *See, e.g., Luciano v. Olsten Corp.*, 110 F.3d 210 (2d Cir. 1997) (Title VII action); *Ayoub v. Spencer*, 550 F.2d 164 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977) (medical malpractice); *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), *cert. denied*, *City of Fayetteville, N.C. v. Spell*, 484 U.S. 1027 (1988) (civil rights action); *National Union Fire Ins. Co. v. Cagle*, 68 F.3d 905 (5th Cir. 1995) (insurance fraud); *Federal Deposit Ins. Corp. v. Mijalis*, 15 F.3d 1314 (5th Cir. 1994) (breach of fiduciary duty, breach of contract, and negligence); *Bradshaw v. Freightliner Corp.*, 937 F.2d 197 (5th Cir. 1991) (products liability); *Petes v. Hayes*, 664 F.2d 523 (5th Cir. 1981) (products liability); *Houston v. Herring*, 562 F.2d 347 (5th Cir. 1977) (products liability); *Clarksville-Montgomery County Sch. Sys. v. United States Gypsum Co.*, 925 F.2d 993 (6th Cir. 1991) (products liability); *Cincinnati Fluid Power, Inc. v. Rexnord, Inc.*, 797 F.2d 1386 (6th Cir. 1986) (breach of contract); *Miller v. Utica Mill Speciality Mach. Co, Inc.*, 731 F.2d 305 (6th Cir. 1984) (products liability); *Binks Mfg. Co. v. National Presto Indus. Inc.*, 709 F.2d 1109 (7th Cir. 1983) (breach of contract); *Stoneking v. United States*, 232 F.2d 385 (8th Cir.), *cert. denied*, 352 U.S. 835 (1956), and *cert. denied*, 354 U.S. 941 (1957) (bank robbery and conspiracy conviction); *United States v. Tagalicud*, 84 F.3d 1180 (9th Cir. 1996) (conviction for conspiracy to defraud immigration and naturalization service); *United States v.*

Smith, 13 F.3d 1421 (10th Cir.), *cert. denied*, 513 U.S. 878 (1994) (mail fraud and money laundering conviction); *United States v. Starke*, 62 F.3d 1374 (11th Cir. 1995) (money laundering conviction); *Mark Seitman & Assoc., Inc. v. R.J. Reynolds Tobacco Co.*, 837 F.2d 1527 (11th Cir. 1988) (breach of contract). These cases uniformly apply the "likely to mislead" test in any event.

Like the opinion below, all the circuits consider the district court's jury instructions "as a whole." *Tatro*, 41 F.3d at 14; *Anderson*, 17 F.3d at 556; *Bennis v. Gable*, 823 F.2d 723, 727 (3d Cir. 1987); *United States v. Fleschner*, 98 F.3d 155, 158 (4th Cir. 1996), *cert. denied, Clarkson v. United States*, 117 S. Ct. 2484 (1997); *Davis*, 40 F.3d at 786; *Miller*, 731 F.2d at 307; *Doe*, 6 F.3d at 479; *Westborough Mall*, 794 F.2d at 335; *Masson*, 85 F.3d at 1397; *Gardetto*, 100 F.3d at 816; *Morro*, 117 F.3d at 513; *United States v. Washington*, 106 F.3d 983, 996-97 (D.C. Cir. 1997).

Respondent has not found any cases in which a court reversed a jury verdict simply on the ground that the jury questions differed from otherwise accurate general instructions. This is consistent with our system's faith in the institution of the jury and the general proposition that the jury is the representative of "the commonsense judgment of the community." *Teague v. Lane*, 489 U.S. 288, 314 (1989); *cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) ("The authority of an appellate court, when reviewing the findings of . . . jury, is circumscribed by the deference it must give to decisions of the trier of fact . . . . ").

2. The "Substantial and Ineradicable Doubt" Standard

The "substantial and ineradicable doubt" language that appears in the opinion below and on which Petitioner attempts to fabricate a circuit split addresses a completely separate issue from the "likely to mislead" standard. Unlike the "likely to mislead" language, which refers to the state of mind of the jury that has heard erroneous jury instructions, the "substantial and ineradicable doubt" language describes the requisite level of certitude of the appellate court that the jury was misled.[1] The courts of appeals that have addressed the issue have held that reversal is appropriate if the appellate court has "substantial and ineradicable doubt whether the jury has been properly guided." Pet. at 6. For example, one court has explained its approach to erroneous jury instructions as follows:

> In reviewing a trial court's jury instructions, an appellate court "look[s] to see whether the charges, considered as a whole, sufficiently instruct the jury so that the jurors understand the issues involved and are not misled." "Reversal is warranted only if we are left with 'a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations.' "

---

[1] Petitioner simply misunderstands the "substantial and ineradicable doubt" language when it states that "[t]he application of this test requires a determination that there is a substantial and ineradicable doubt *among the jurors* as to the correct law to be applied." Pet. at 6 (emphasis added).

Verbraeken v. Westinghouse Elec. Corp., 881 F.2d 1041, 1050 (11th Cir. 1989), *cert. dismissed*, 493 U.S. 1064 (1990) (citations omitted). *See Davis*, 40 F.3d at 786; *Westborough Mall*, 794 F.2d at 335; *First Dakota Nat'l Bank v. St. Paul Fire & Marine Ins. Co.*, 2 F.3d 801, 816 (8th Cir. 1993). The three circuits that have considered the issue of the requisite appellate court certitude regarding whether the jury was misled by erroneous jury instructions–the Fifth, the Eighth, and the Eleventh Circuits–have landed upon a single standard, the "substantial and ineradicable doubt" standard. All other circuits have been silent on the issue.

In sum, neither the "likely to mislead" standard nor the "substantial and ineradicable doubt" standard raises an important federal question, implicates a circuit split, or requires this Court's attention. *See* Sup. Ct. R. 10 (Considerations Governing Review on Certiorari).

B. This Case Is Moot

Even if this Court were inclined to entertain a question involving the standard of review to be applied to erroneous jury instructions in constitutional law cases, this case is not the proper vehicle because the case is moot. As this Court stated recently, "[t]o qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.' " *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1068 (1997) (citations omitted). There is no continuing controversy between The Guide and the City. The Guide's complaint rested on the claim that the competitive bidding process, codified in Eagle

Pass, Tex., Ordinance No. 93-12, was prompted by, susceptible to, and tainted by retaliatory motives in violation of the First Amendment. The ordinance underlying the claim of misconduct was repealed on August 26, 1996. Resp. App. at 8-10. It was replaced by a policy that splits the City's public notice business between The Guide and The Gram. As a result, The News Guide carried the City's public notices from January 25, 1997 through July 14, 1997. Resp. App. at 11.

There is no continuing case or controversy between the City and The News Guide. The offending bid procedure is no longer in existence and the business at issue is being divided evenly between the eligible newspapers.

C. There Is No Important Federal Question Raised by the Court of Appeals' Finding that It Had No "Substantial and Ineradicable Doubt That the Jury Was Properly Guided in Its Deliberations"

Petitioner suggests that this Court should grant certiorari in order to review the court of appeals' finding that it had no "substantial and ineradicable doubt that the jury was properly guided in its deliberations." Pet. at 13. Such an individualized finding raises no important federal question worthy of this Court's attention.

CONCLUSION

For the foregoing reasons, the petition for the writ of certiorari should be DENIED.

Respectfully submitted,

MARCI A. HAMILTON, Esq.
482 Kings Road
Yardley, PA 19067
(215) 493-1973
(215) 493-1094 (facsimile)
Counsel of Record

RICARDO J. NAVARRO
DENTON, MCKAMIE & NAVARRO
A PROFESSIONAL CORPORATION
1700 Tower Life Building
310 S. St. Mary's Street
San Antonio, TX 78205-3111
(210) 227-3243
(210) 225-4481 (facsimile)

Attorneys for Respondents

RESPONDENT'S APPENDIX

ORDINANCES NO. 93-12

AN ORDINANCE ESTABLISHING PROCEDURES FOR THE ANNUAL SELECTION OF THE OFFICIAL PUBLICATION OF THE CITY OF EAGLE PASS; AND PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, the City Charter of the City of Eagle Pass provides that certain ordinances shall be published in the official publication of the City of Eagle Pass; and

WHEREAS, Article 28a of the Texas Revised Civil Statutes provides the minimum requirements for qualifying as a legal publication; and

WHEREAS, Article 29a of the Texas Revised Civil Statutes provides for matters to be published in the official publication of a governmental entity; and

WHEREAS, Section 52.004 of the Texas Local Government Code requires the City of Eagle Pass after the beginning of each municipal year to contract, as determined by ordinance or resolution, with a newspaper to be the official publication of the City of Eagle Pass; and

WHEREAS, the City of Eagle Pass does not have an ordinance or resolution requiring the annual selection of a newspaper as the official publication of the City of Eagle Pass as required by state law; and

WHEREAS, the City of Eagle Pass desires to comply with state law regarding the selection of a newspaper as the official publication of the City of Eagle Pass.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EAGLE PASS, TEXAS, as follows:

SECTION 1. The City of Eagle Pass shall select and designate each fiscal year a newspaper as the official publication of the City of Eagle Pass for publication of City ordinances, notices, and other matters required by law, city charter, ordinance, contract, or other to be published.

SECTION 2. The fiscal year of the City of Eagle Pass shall be from October 1st of each year through September 30th of the succeeding year.

SECTION 3. The City of Eagle Pass, by and through its City Manager, shall request proposals each fiscal year from newspapers in Maverick County, Texas to become the official publication of the City of Eagle Pass no later than thirty (30) days prior to October 1st. The City Manager shall prepare and provide each year the request for proposals to be completed by newspapers interested in becoming the official publication of the City of Eagle Pass. All newspapers interested in submitting a proposal shall do so by no later than September 15th of each year, unless September 15th falls on a Saturday, Sunday or legal holiday, then on the first business day of the City of Eagle Pass following September 15th. The City Council of the City of Eagle Pass shall each fiscal year award to and designate a newspaper as the official publication of the City of Eagle Pass by resolution at their first regular meeting in October.

SECTION 4. All newspapers interested in submitting proposals for the official publication of the City of Eagle Pass shall meet the minimum

requirements set forth in Section 2 of Article 28a of the Texas Revised Civil Statutes and/or as thereafter amended or provided by state law.

SECTION 5. This Ordinance shall become effective from and after its final passage as provided by law.

READ, PASSED, AND APPROVED, ON FIRST READING this 28th Day of June, A.D., 1993.

/s/ Arturo Garcia, Mayor
Arturo Garcia, Mayor

ATTEST:

/s/ J. Irma Morales
J. Irma Morales
City Secretary

AYES: Garcia, Hernandez, Cardona, Rodriguez, and Riojas

NAYS: None

APPROVED AS TO LEGALITY:

ABSENT: None

/s/ Ricardo E. Calderon
Ricardo E. Calderon
City Attorney

READ, PASSED, AND APPROVED, ON SECOND READING this 6th Day of July, A.D., 1993.

/s/ Arturo Garcia, Mayor
Arturo Garcia, Mayor

ATTEST:

/s/ J. Irma Morales
J. Irma Morales
City Secretary

AYES: Garcia, Hernandez, Cardona, Rodriguez, and Riojas

NAYS: None

APPROVED AS TO LEGALITY:

ABSENT: None

/s/ Ricardo E. Calderon
Ricardo E. Calderon
City Attorney

READ, PASSED, AND APPROVED, ON THIRD AND FINAL READING this 20th Day of July, A.D., 1993.

/s/ Arturo Garcia, Mayor
Arturo Garcia, Mayor

ATTEST:

/s/ J. Irma Morales
J. Irma Morales
City Secretary

AYES: Garcia, Hernandez, Cardona, Rodriguez, and Riojas

NAYS: None

APPROVED AS TO LEGALITY:

ABSENT: None

/s/ Ricardo E. Calderon
Ricardo E. Calderon
City Attorney

* * *

[Minutes of]
City Council Special Meeting
Monday, August 26, 1996
Page 3

OTHER BUSINESS

5. Consideration and possible action upon an Ordinance rescinding Ordinance No. 93-12 concerning the designation of the Official Newspaper for the City of Eagle Pass.

Mayor Rogelio Flores read, for the record, in total and in full, an Ordinance captioned as follows, which said Ordinance was submitted for first reading and is hereby incorporated and made a part of these minutes:

ORDINANCE NO. _____

AN ORDINANCE REPEALING ORDINANCE NO. 93-12 PROVIDING FOR THE DESIGNATION OF AN OFFICIAL CITY NEWSPAPER; AND PROVIDING FOR AN EFFECTIVE DATE

Councilman David Riojas asked if there was any recommendation regarding what system they are going to implement for the future.

Interim City Manager, Roberto Gonzalez, stated that because of the deadline that is imposed in the existing ordinance, the immediate thing to do is to repeal said ordinance and continue with the same practice until October 1, 1996. He also stated that after conferring with legal counsel and the Mayor, it is their intent to come back before the Council and make a recommendation on whether it will be left up to Administration to decide the

procedures to be followed or if at a future time an ordinance will be considered by Council on how this advertisement will be carried out after October 1, 1996.

Mayor Rogelio Flores stated that the intention is to have both newspapers participate equally and fairly in the advertisements of the City, and maybe later in September they can come up with an agreeable agreement between both newspapers, and if that is not possible, then have Administration decide on it. He added that he had talked to Mr. Ruben Carrillo and Mr. Rex McBeath, and due to the on-going litigation between the City and the G.P. News Guide, Mr. McBeath had no comments at this time.

In response to a question posed by Councilman Jose Guerra, City Attorney, Michael C. Boyle, stated that as a home-rule City, there is no requirement that the City have an ordinance designating an official newspaper. He added that the current ordinance is not improper or wrong, but it is not necessary. He stated that what the Council is doing is repealing the existing ordinance regarding designation of an official newspaper, and that he does not believe that this would have any effect on the pending litigation or appeal. He also stated that any matter which was tried in the district court dealt with issues that existed prior to any actions the Council may take now. He advised the City Council that if they wanted to repeal the existing ordinance they could, and if they did not wanted [sic] to repeal the ordinance and keep it in effect, even though it is not necessary, then they would have to proceed with the bidding and follow the procedures, but the decision was for the Counsel to make.

In response to a comment made by Councilman Oscar L. Rodriguez, City Attorney, Michael C. Boyle, explained that when Ordinance No. 93-12 was adopted by the City, it was not necessarily required by statute to do it, but there was nothing to prevent the City from doing it. He further explained that if you are a home-rule City, you can pass an ordinance such as Ordinance No. 93-12, and there is nothing wrong with doing so, and that as a home-rule City they can also repeal it. He stated that it was not an illegal act and

* * *

ORDINANCE NO. 96-16

AN ORDINANCE REPEALING ORDINANCE NO. 93-12, PROVIDING FOR THE DESIGNATION OF AN OFFICIAL CITY NEWSPAPER; AND PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, on June 28th, 1993, the City Council of the City of Eagle Pass, Texas ("City"), passed Ordinance No. 93-12 providing for a mothod [sic] by which the City would designate an official City newspaper for a specific period of time; and

WHEREAS, the City has now determined that it does not wish to be restricted by the provisions of Ordinance No. 93-12, and that the same should be in all things repealed.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EAGLE PASS, TEXAS, as follows:

SECTION 1. The City Council of the City of Eagle Pass hereby repeals Ordinance No. 93-12 providing for the designation of an official City newspaper for a specific period of time, and as repealed, such Ordinance shall have no further force or effect.

SECTION 2. This Ordinance shall become effective from and after its final passage as provided by law.

READ, PASSED, AND APPROVED ON FIRST READING this 26th Day of August, A.D., 1996.

/s/ Rogelio Flores
Rogelio Flores, Mayor

ATTEST:

/s/ J. Irma Morales
J. Irma Morales
City Secretary

AYES: Flores, Guerra, Rodriguez, Riojas, and Sandoval

READ, PASSED, AND APPROVED ON SECOND READING this 4th Day of September, A.D., 1996.

/s/ Rogelio Flores
Rogelio Flores, Mayor

ATTEST:

/s/ J. Irma Morales
J. Irma Morales
City Secretary

AYES: Flores, Guerra, Riojas, and Sandoval

NAYS: None

ABSENT: Oscar L. Rodriguez

APPROVED AS TO LEGALITY:

/s/ Michael C. Boyle
Michael C. Boyle
City Attorney

READ, PASSED, AND APPROVED ON THIRD AND FINAL READING this 26th Day of September, A.D., 1996.

/s/ Rogelio Flores
Rogelio Flores, Mayor

ATTEST:

/s/ J. Irma Morales
J. Irma Morales
City Secretary

AYES: Flores, Guerra, Rodriguez, Riojas, and Sandoval

NAYS: None

ABSENT: None

APPROVED AS TO LEGALITY:

/s/ Michael C. Boyle
Michael C. Boyle
City Attorney

January 14, 1997

To Whom It May Concern:

The following is a schedule the City of Eagle Pass will use when publishing ordinances, legal notices and public notices:

1. Beginning January 15, 1997 until July 14, 1997, the City will publish its ordinances, legal notices and public notices in the Guide Publishing Company.

2. Beginning July 15, 1997 until January 14, 1998, the City will publish its ordinances, legal notices and public notices in the News Gram.

3. The City will make every effort to distribute all of its other advertising equally amongst all the News Media.

4. There might be overlapping periods where ordinances or notices will be published in the print media contrary to the schedule on items 1 and 2 above. That will only occur if we had previous commitments to advertise in that print media.

5. The City is not designating any print media as the City's official newspaper.

6. The print media must not charge more than their lowest published rate as required by law for advertising and publishing.

7. A certification from the print media certifying that they are not charging the City more than their lowest published rate as required by law for advertising and publishing.

8. The city must be invoiced on a monthly basis.

It is the City's intention to receive the best possible service and prices while being fair with all the News Media.

If there are any questions regarding the above, contact Mr. Pete Sepulveda, Jr., City Manager.

[LOGO]

HAND-DELIVERED

January 14, 1997

Mr. Ruben Carrillo Mazuka
The News Gram
1131 North Bibb
Eagle Pass, Texas 78852

Dear Mr. Mazuka:

Attached is a schedule the City will follow when publishing ordinances, legal and public notices.

It [sic] you have any questions, call me.

Sincerely,

CITY OF EAGLE PASS

/s/ Pete Sepulveda, Jr.
Pete Sepulveda, Jr.
City Manager

1/16/97
AMR
xc: Manuel Contreras,
Finance Dir.
Irma Morales,
City Secretary

psj:sg
Attachment

[LOGO]

HAND-DELIVERED

January 14, 1997

Mr. Rex McBeath
The Guide Publishing Company
P.O. Box 764
Eagle Pass, Texas 78853-0764

Dear Rex:

Attached is a schedule the City will follow when publishing ordinances, legal and public notices.

If you have any questions, call me.

Sincerely,

/s/ Pete Sepulveda, Jr.
Pete Sepulveda, Jr.
City Manager

1/16/97
AMR
xc: Manuel Contreras,
Finance Dir.
Irma Morales,
City Secretary

psj:sg

Attachment